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In the

Supreme Court of the United States

No. 695

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

ROSA LEE ROOSTH,
Respondent.

REPLY TO PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHAS. F. POTTER,
Box 359,
Tyler, Texas,
Attorney for Respondent.

Of Counsel:
SPRUIELL, LOWRY, POTTER,
LASATER & GUINN,
Box 359,
Tyler, Texas.

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To the Honorable Supreme Court of the United States:

In reply to the Petition for Certiorari filed by the Lincoln National Life Insurance Company, Rosa Lee Roosth, Respondent, respectfully shows:

NATURE OF THE CASE

The two opinions by the Circuit Court of Appeals fairly explain the case and the points involved, *269 F. 2d 171; 306 F. 2d 110.* The sole basis for the Petition is that in its second opinion the Circuit Court chose to rest its decision on the law of the case rather than to evaluate the evidence a second time.

QUESTION INVOLVED
(As viewed by Respondent)

1. Whether the Circuit Court of Appeals properly applied the law of the case instead of re-evaluating the same conflicting evidence.

STATEMENT AND ARGUMENT

There is no difference between the parties or the Circuit Judges as to the scope of the "law of the case" doctrine. The cases relied upon by the Circuit Court are consistent with those cited by Petitioner. The only difference is in its application to the facts, and the only difference there is, admitting that factual evidence in both trials is the same, whether on the second appeal the factual evidence shall be evaluated a second time.

In its first decision *(269 F. 2d 171)* the Circuit Court exhaustively analyzed the fact controversy. A Petition for Certiorari was denied. *361 U. S. 917*. The basis for that Petition was alleged error of the Circuit Court in holding that the evidence raised jury issues. We appreciate the limited effect of denial of certiorari, but the reasons for granting it now are no greater than then. The basic argument of petitioner is the same, that the evidence sustains its defense as a matter of law.

The tenor of the Petition is that the Circuit Court erroneously assumed that it was bound by the law of the case, followed by legal arguments that the court had the right to reverse its prior decision. An examination of the Circuit

Court's second opinion shows the error of this argument, that the premise is incorrect, because the court primarily held that it did have the right to reverse the prior decision but holds that it is proper to apply the law of the case.

No argument is needed to demonstrate the undesirability of judicial freedom, a court reversing itself in the same case. The court retains this power, but to be exercised with reticence and with the highest degree of care. The ends of justice may be better served by applying the law of the case than by a second review of the same evidence.

A personal element is involved in weighing the conflicting evidence. The many differences of opinion in the case history prove the propriety of applying the "law of the case" to the second decision. There is the original jury deadlock, the final jury verdict, the opinion of the trial judge, the two panels of the Circuit Court, and the divided court sitting en banc, all differing as to the interpretation of the evidence. There is the Supreme Court's denial of Certiorari to the first decision.

Can it be that the first decision of the Circuit Court is clearly and manifestly wrong?

There is no legal point to be argued. Every one and every court is in agreement that the law of the case does not affect the power or jurisdiction of the court to correct a clearly erroneous decision. The law of the case is a sound legal doctrine and is to be applied but in exceptional cases. The

difference between the contesting parties is whether this is an exceptional case; we submit that it is not.

Wherefore, respondent prays that the Petition for Certiorari be denied.

Chas F. Potter

SPRUIELL, LOWRY, POTTER, LASATER & GUINN,
Box 359, Tyler, Texas,

By: Chas F. Potter
CHAS. F. POTTER
Attorneys for Rosa Lee Roosth, Respondent.

I certify that a copy of the foregoing Reply to Petition for Certiorari has been delivered to Thos. B. Ramey, Attorney for Petitioner, Citizens First National Bank Building, Tyler, Texas, this 11 day of January, 1963.

Chas F. Potter
CHAS. F. POTTER